



Office of the Attorney General
State of Texas

DAN MORALES
ATTORNEY GENERAL

June 29, 1994

Mr. Douglas L. Baker
Assistant District Attorney
Wichita County
900 Seventh Street
Wichita Falls, Texas 76301-2482

OR94-301

Dear Mr. Baker:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, Government Code chapter 552. We assigned your request ID# 26566.

Wichita County (the "county") has received a request for a document reviewed by the county commissioner's court in closed session. Specifically, the requestor seeks a "demand or claim for compensation submitted to Wichita County Commissioner's Court by Bright Ideas School and discussed by Wichita County commissioners . . . [and the county judge] during a closed meeting on Monday, May 16, 1994, along with any cover letter or other information accompanying that claim or demand for compensation." You have submitted the requested information to us for review and ask whether the Open Records Act requires its public disclosure.

Section 552.101 of the Open Records Act excepts "information considered to be confidential by law, either constitutional, statutory or by judicial decision." You believe that the requested information may be excepted from disclosure under the Open Records Act because it was reviewed during an executive session held pursuant to the Texas Open Meetings Act, Government Code chapter 551, and is for that reason within the Open Meetings Act provisions that accord confidentiality to the certified agenda or tape recording of an executive session. See Gov't Code §§ 551.104, 551.146.

On the basis of the provisions now codified as sections 551.104 and 551.146 of the Government Code, this office has concluded that the tape and certified agenda are not subject to disclosure under the Open Records Act, Attorney General Opinion JM-995 (1988), and in fact, may not even be reviewed by the Attorney General pursuant to the Open Records Act, Open Records Decision No. 495 (1988). These confidentiality

provisions, however, are drafted narrowly, so that they apply only to the certified agenda or tape recording. In Attorney General Opinion JM-1071, this office stated:

We interpret subsection 2A(h) [now Government Code section 551.146(a)] as applying only to the records of executive sessions which governmental bodies are required to keep pursuant to section 2A [now Government Code section 551.103] of the act.

Attorney General Opinion JM-1071 at 1. *See also* Open Records Decision Nos. 605 (1992); 485 (1987) (holding that the fact that information was discussed in executive session does not make it confidential under the Open Records Act). Thus, sections 551.104 and 551.146 apply only to the tape recording or certified agenda prepared in compliance with section 551.103 of the Government Code. The information submitted to us for review is not a certified agenda or tape recording that section 551.103 of the Government Code requires a governmental body to prepare and maintain. Accordingly, this information is not within sections 551.104 and 551.146 of the Government Code and is therefore not information "considered to be confidential by [statutory] law" within section 552.101 of the Government Code.

Without expressly stating so, you also indicate that the county may withhold the requested information under section 552.103(a) of the Government Code, the "litigation exception." Section 552.103(a) excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection.

For information to be excepted from public disclosure by section 552.103(a), litigation must be pending or reasonably anticipated and the information must relate to that litigation. *Heard v. Houston Post Co.*, 684 S.W.2d 210 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); *see also* Open Records Decision No. 551 (1990) at 5. Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986) at 4.

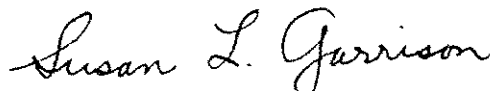
We need not consider whether the requested information relates to pending or reasonably anticipated litigation. We note that the "demand or claim" was submitted to the commissioners court on behalf of the potential opposing party in the anticipated litigation. Generally, when parties to litigation have had access to the records pursuant to discovery or any other means, section 552.103(a) may no longer be invoked. Open

Records Decision No. 597 (1991) (concluding that statutory predecessor to section 552.103 did not except basic information in offense report that was previously disclosed to defendant in criminal litigation); *see also* Open Records Decision Nos. 551 at 4; 511 at 5, 493 (1988) at 2; 349, 320 (1982). Moreover, the attorney for the political subdivision must have determined that the records should be withheld from the public. The required determination has not been made in this case.

We conclude, therefore, that the county may not withhold the requested information under section 552.103(a) of the Government Code. Accordingly, the county must release the requested information in its entirety.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please contact this office.

Yours very truly,



Susan L. Garrison
Assistant Attorney General
Open Government Section

SLG/GCK/rho

Enclosed: Submitted documents

Ref.: ID# 26566

cc: Ms. Holly Clanahan
Reporter
Times-Record News
P.O. Box 120
Wichita Falls, Texas 76307
(w/o enclosures)